EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

NO. 85-816

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF CONNECTICUT,
Petitioner

v.

RONALD SUTTON,
Respondent.

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

JON C. BLUE
Chief Public Defender Office
121 Elm Street
New Haven, CT 06510
(203) 789-7477
Counsel for Respondent

November 22, 1985

QUESTION PRESENTED FOR REVIEW

Did the imposition of a more severe sentence on Respondent following his reconviction after he had successfully challenged his first conviction fail to comport with the requirements of North Carolina v. Pearce, 395 U.S. 711 (1969), and deprive him of liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW....1

TABLE OF AUTHORITIES....iii

OPINIONS BELOW....1

JURISDICTION....1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED....2

STATEMENT OF THE CASE

I. THE INITIAL PLEA AND SENTENCE....3

II. THE HABEAS CORPUS ACTION....4

III. THE SUBSEQUENT TRIAL AND SENTENCE....5

IV. THE DECISION OF THE SUPREME COURT OF CONNECTICUT....7

REASONS FOR DENYING THE WRIT

I. THE PETITION WAS NOT TIMELY FILED....7

II. THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND....8

III. THE QUESTION OF FEDERAL LAW IS CONTROLLED BY PRIOR DECISIONS OF THIS COURT....9

CONCLUSION....12

TABLE OF AUTHORITIES

CASES — Page

Michigan v. Long, 463 U.S. 1032 (1983).....9

North Carolina v. Alford, 400 U.S. 25 (1970).....3

Schacht v. United States, 398 U.S. 58 (1970).....8

Simpson v. Rice, decided sub nom. North Carolina v. Pearce, 395 U.S. 711 (1969).....9,10,11

State v. Sutton, 197 Conn. 485, 498 A.2d 65 (1985)..1,7,8,9,11

Sutton v. Warden, No. 266428 (Hartford J.D. April 28, 1982).....1,4

STATUTES

Conn. Gen. Stat. §53a-35 (1979).....2

Conn. Gen. Stat. §53a-62 (1979).....3

Conn. Gen. Stat. §53a-70 (1979).....3

Conn. Gen. Stat. §53a-94 (1979).....3

OTHER AUTHORITIES

Brief of Petitioner in Simpson v. Rice, decided sub nom. North Carolina v. Pearce, 395 U.S. 711 (1969).....10

Sup. Ct. R. 1.....1

Sup. Ct. R. 20.....7,8

NO. 85-816

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF CONNECTICUT,
Petitioner,

v.

RONALD SUTTON,
Respondent.

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF CONNECTICUT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Connecticut is reported as State v. Sutton, 197 Conn. 485, 498 A.2d 65 (1985). The previous opinion of the Superior Court of Connecticut vacating Respondent's initial conviction and sentence, Sutton v. Warden, No. 266428 (Hartford J.D. April 28, 1982), is unreported but is reprinted in full in the opinion of the Supreme Court of Connecticut, 197 Conn. at 493 n.12, and can be found in the Appendix to the Petition at 10A n.12.

JURISDICTION

The jurisdiction of this Court, set forth in the Petition, is conceded by Respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions set forth in the Petition, this case involves Conn. Gen. Stat. §53a-35 (1979), which provides as follows:

> Sec. 53a-35. Imprisonment for felony: Indeterminate; maximum and minimum sentences. (a) A sentence of imprisonment for a felony shall be an indeterminate sentence, except as provided in subsection (d). When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subsection (b) and the minimum term shall be as provided in subsection (c) or (d).
>
> (b) The maximum term of an indeterminate sentence shall be fixed by the court and specified in the sentence as follows: (1) For a class A felony, life imprisonment; (2) for a class B felony, a term not to exceed twenty years; (3) for a class C felony, a term not to exceed ten years; (4) for a class D felony, a term not to exceed five years; (5) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime; and (6) for a capital felony, life imprisonment unless a sentence of death is imposed in accordance with section 53a-46a.
>
> (c) Except as provided in subsection (d) the minimum term of an indeterminate sentence shall be fixed by the court and specified in the sentence as follows: (1) For a class A felony, the minimum term shall not be less than ten nor more than twenty-five years; (2) for a class B, C or D felony the court may fix a minimum term of not less than one year nor more than one-half of the maximum term imposed, except that (A) where the maximum is less than three years the minimum term may be more than one-half the maximum term imposed or (B) when a person is found guilty under section 53a-59(a)(1), section 53a-59a, 53a-101(a)(1) or 53a-134(a)(2), the minimum term shall be not less than five years and such sentence shall not be suspended or reduced, or when a person is found guilty under section 53a-60c, the minimum term shall be not less than three years and such sentence shall not be suspended or reduced, or when a person is found guilty under section 53a-60b, the minimum term shall be not less than two years and such sentence shall not be suspended or reduced; (3) for an unclassified felony, a term in accordance with the sentence specified in the section of the general statutes that defines the crime.
>
> (d) Notwithstanding the provisions of subsections (a) and (c), except as provided in subdivision (2) of said subsection (c), when a person is sentenced for a class C or D felony or for an unclassified felony, the maximum sentence for which does not exceed ten years, the court may impose a definite sentence of imprisonment

and fix a term of one year or less; except when a person is found guilty under sections 53a-55a, 53a-60a, 53a-70a, 53a-72b, 53a-92a, 53a-94a, 53a-102a and 53a-103a, the court shall not fix a term of less than one year.

STATEMENT OF THE CASE

I. THE INITIAL PLEA AND SENTENCE

This case turns upon a somewhat complicated set of facts. A proper understanding of the decision of the Supreme Court of Connecticut requires a considerably more detailed statement of the case than that contained in the Petition.

On October 3, 1979, Petitioner filed an information in the Superior Court of Connecticut charging Respondent with the crimes of sexual assault in the first degree, in violation of Conn. Gen. Stat. §53a-70(a) (1979); kidnapping in the second degree, in violation of Conn. Gen. Stat. §53a-94(a) (1979); and threatening, in violation of Conn. Gen. Stat. §53a-62(a)(1) (1979). (R.1.)[1] On July 7, 1981, Respondent pleaded guilty to all counts under the doctrine of North Carolina v. Alford, 400 U.S. 25 (1970). Prior to the trial court's acceptance of the plea, the State's Attorney recited the factual basis for the plea, describing the incident at length and setting forth the array of corroborative testimony that the State would have presented at trial. (7/7/81 T.5-19.) The court advised Respondent that he was "exposed to a period of incarceration that could be in the area of not less than 20 and no more than 40 years." When Respondent responded that he so understood, the court accepted the plea. The State's Attorney then represented that in his opinion, "a fair sentence in this case would be not less than eight nor more than sixteen years," but stated, "I understand the Court has dictated to the contrary to some degree." The court acknowledged that, in the absence of subse-

1/ "R." stands for the printed record on appeal to the Supreme Court of Connecticut. "T." stands for the trial court transcript.

quent misconduct by the Defendant, it would impose a sentence of 7 to 12 years. It stated that it had taken "into consideration" the fact that it did not want to put the complaining witness "through the trauma of coming into court and testifying." A presentence investigation was ordered. (7/7/81 T.23-26).

A Presentence Investigation Report was filed on August 11, 1981. It described the crime in detail, noted that Respondent flatly denied having committed it, and detailed Respondent's previous criminal record, which included three prior felony convictions. At the sentencing hearing, on August 14, 1981, Petitioner requested the maximum sentence of 20 to 40 years. The court indicated that it had reviewed the presentence report and was well aware of the facts of the case and Respondent's prior background. It then imposed a total effective sentence of 7 to 12 years. (8/14/81 T.2-5).

II. THE HABEAS CORPUS ACTION

On November 30, 1981, Respondent filed a habeas corpus action, Sutton v. Warden, No. 266428 (Hartford S.C.), alleging that he was illegally confined because the minimum term of his sentence was more than one-half of the maximum term, in violation of Conn. Gen. Stat. §53a-35(c)(2) (1979). He asked that his sentence be declared null and void.

At a hearing on March 15, 1982, Petitioner argued that a court reviewing a petition for a writ of habeas corpus "does not have the authority to change sentences, and this matter should be referred to sentence review or [Respondent] should be allowed to withdraw his plea, and we start from round one again." Respondent stated that a withdrawal of his plea would be "fine" with him, and Petitioner represented that it would be "delighted" with this outcome. The court and both counsel respectively ad-

vised Respondent, however, that if he were reconvicted he faced the possibility of a more severe sentence, and the court adjourned the hearing until it received written confirmation of the Respondent's wishes. (3/15/82 T.2-9.)

On April 28, 1982, having been informed that Respondent did indeed wish to withdraw his plea, the court filed a Memorandum of Decision finding that Respondent's sentences "are void and that his continued imprisonment is illegal." It ordered that Respondent "be released and that a new trial be had promptly if the state wishes to prosecute." See Petition at 10A n.12.

III. THE SUBSEQUENT TRIAL AND SENTENCE

Respondent elected to be tried by a jury. At the trial, the complaining witness, who was now 18 years of age, described the crime and identified Respondent as her assailant. Her testimony did not significantly vary from the description of the crime that Petitioner had originally given in setting forth the factual basis for Respondent's guilty plea on July 7, 1981. (T.6-13; 7/7/81 T.5-8.) Petitioner presented an array of evidence corroborating both the complaining witness's description of the crime and her identification of Respondent as her assailant. Respondent's defense essentially consisted of his own testimony that he had been involved in a traffic accident at another location at the time of the crime and expert toxicological testimony that blood and seminal stains found on a tampon at the scene of the crime were of a different type (Group O) than the blood groups of Respondent and the complaining witness. (Both were Type A.) On October 4, 1982, the jury found Respondent guilty as charged.

The sentencing hearing was held on October 5, 1982. No new presentence report having been prepared, the parties and the court relied on the report that had been prepared for the

original sentencing hearing on August 14, 1981. Petitioner additionally relied on a psychiatric report that had been prepared for a competency hearing held prior to Respondent's original plea of guilty. Petitioner concluded that Respondent had "wanted his day in court. He had his day in court, and now it's time for his past record to catch up with him." It recommended that "on each of the three counts, that a maximum sentence be imposed, to run consecutively." It at no point alleged that Respondent had engaged in any misconduct occurring after the time of the original sentencing proceeding. (10/5/82 T.2-4).

Respondent's attorney reminded the court that Respondent had originally been sentenced to a term of 7 to 12 years and argued that he should not be penalized for the exercise of his constitutional rights. (10/15/82 T.6.) Respondent, on allocution, stated that,

> [S]ince I was sentenced illegally at the first trial, and the Prosecutor or my attorney made no attempt to correct it, and the Judge surely knew it was an illegal sentence, I believe if I am sentenced to a longer term, it is only to punish me for asking what is guaranteed me by both the State and Federal Constitution, and by this State Statutes. Not once was I offered the chance to have my illegal sentence corrected without risking a longer sentence.

(10/5/82 T.7.)

Petitioner responded that Respondent had been duly warned that if he chose to vacate his former plea and sentence he faced the possibility of a more severe sentence and criticized what it termed the "unmitigated gall" of Respondent's assertion that he could not receive a more severe sentence. (10/5/82 T.8.)

The court stated that,

> I, of course, sat through this trial, and listened to what took place here, and it was atrocious. The thing that happened to this little girl is a horrible thing, and she had to come in here and testify, as did her entire family; mother, father, and sister, and they did; and I suppose it will be a long time before this little girl is able to put it out of her mind as to what happened to her on that day.

> I understand that the accused could do as he did, in asking that the prior matter be vacated, and that he be allowed to proceed to trial, and that, of course, was accorded him, and he has had his trial ...

(10/15/82 T.12.) It then alluded to Respondent's prior criminal record and imposed a total effective sentence of 16 to 31 years. It at no point indicated that Respondent had engaged in any misconduct occurring after the time of the original sentencing proceeding. (R.6; 10/15/82 T.13.)

IV. THE DECISION OF THE SUPREME COURT OF CONNECTICUT

Respondent filed a timely appeal to the Supreme Court of Connecticut. On September 10, 1985, the Supreme Court of Connecticut found error and remanded the case to the trial court for resentencing. State v. Sutton, supra. The court found that the sentence imposed on October 5, 1982, violated both statutory and constitutional commands. The statutory violation is virtually identical to the defect in Respondent's initial sentence. The minimum term is more than one-half of the maximum term. See 197 Conn. at 501-02; Petition at 18A-19A. The constitutional violation occurred because, when the second sentence was imposed, the trial court did not articulate any factual basis for the imposition of an increased sentence. 197 Conn. at 503-04; Petition at 20A-21A. Consequently, the case was "remanded to the trial court for resentencing not inconsistent with [the] opinion."

On November 12, 1985, Petitioner filed its Petition in this Court seeking review.

REASONS FOR DENYING THE WRIT

I. THE PETITION WAS NOT TIMELY FILED.

The final judgment of the Supreme Court of Connecticut was entered on September 10, 1985. Petition at 2. Sup. Ct. R. 20.1

provides that, "A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort ... shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment." The time prescribed for filing the Petition in the instant case expired on Saturday, November 9, 1985, a day on which the office of the Clerk was open. See Sup. Ct. R. 1.2. The Petition was not, however, filed until November 12, 1985. No application for extension of time has ever been filed.

Although this untimely filing does not deprive the Court of jurisdiction to hear the case, the time limit prescribed by Sup. Ct. R. 20.1 is not a complete nullity and should not be waived in the absence of good cause. This Court's "discretion must be exercised sparingly, and only when an adequate reason exists to excuse noncompliance with [its] Rules." Schacht v. United States, 398 U.S. 58, 69 (1970) (Harlan, J., concurring). In this case, unlike Schacht, Petitioner has advanced no good reason for failing to meet this Court's time requirements. The writ should be denied on this ground alone.

II. THE DECISION BELOW WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The Supreme Court of Connecticut carefully explained that its decision was compelled by state statutory, as well as federal constitutional, law.

> [T]he sentence imposed on October 5, 1982, after [Respondent's] jury trial, was itself illegal, in the sense that ... it did not comport with statutory authority. The sentences on the first and second counts of the information were indeterminate sentences while the sentence imposed on the third count was a definite sentence. The minimum term of sixteen years is more than one-half the maximum term of thirty-one years in violation of General Statutes §53a-35(c)(2). This is so because the one year sentence for threatening was added to both the maximum and minimum terms and not just to the minimum ....

> The sentence imposed on October 5, 1982, was itself illegal because it was not imposed in accordance with statutory authority.

197 Conn. at 501-02; Petition at 18A-19A. (Footnotes omitted.)

"Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." Michigan v. Long, 463 U.S. 1032, 1040 (1983). Such a bona fide separate, adequate, and independent state ground explicitly exists in this case. Under these circumstances, this Court should "not undertake to review the decision." Id. at 1041.

III. THE QUESTION OF FEDERAL LAW IS CONTROLLED BY PRIOR DECISIONS OF THIS COURT.

As the Supreme Court of Connecticut carefully explained, the federal question presented is squarely controlled by Simpson v. Rice, decided sub nom. North Carolina v. Pearce, 395 U.S. 711 (1969). The respondent in that case had originally pleaded guilty to four counts of second-degree burglary and had received an aggregate sentence of 10 years. He subsequently brought a state post-conviction proceeding and was successful in having the judgment set aside on the ground that he had not been accorded his constitutional right to counsel. This time he exercised his right to trial, was convicted, and received an aggregate sentence of 25 years. Id. at 714.

The Alabama warden having custody of Rice submitted a brief to this Court that emphasized the distinction between sentences imposed after pleas of guilty, on the one hand, and sentences imposed after full-fledged trials, on the other. The custodian's argument is worth repeating at some length, for it is, essentially, the very argument that Petitioner makes in the instant case.

> Courts have recognized that pleas of guilty are the result of a bargain or agreement with the prosecutor and that a guilty defendant must always weigh the possibility of receiving a more severe sentence on a plea of not guilty than he will receive as a result of an agreement with the prosecutor for a lighter sentence. Cooper v. Holman, 356 F.2d 82 (5th Cir.), [cert. denied, 385 U.S. 855 (1966)]; and Cortez v. United States, 337 F.2d 699 (9th Cir. [1964), cert. denied, 381 U.S. 953 (1965)].
>
> In Alabama maximum sentences which may be imposed upon persons convicted of crime are fixed by statutes. The effect of the judgment of the court below in the case at bar is to reduce this statutory maximum as to the respondent. If said judgment is allowed to stand the trial courts of the State of Alabama will not be allowed to impose maximum sentences upon convictions after pleas of not guilty in cases in which the accused has been previously sentenced to short terms upon pleas of guilty.
>
> The judgment below approves the finding of the District Court that no justification is shown in the case at bar for more severe punishment after reconviction. It is respectfully submitted that the petitioner should not have been required to show any fact other than the fact that the first conviction was on a plea of guilty and the second conviction was imposed only after a trial on a plea of not guilty. One accused of crime is in many instances given a lighter sentence when he enters a plea of guilty than when he is convicted after insisting that he is not guilty. It is our contention that this is a healthy situation from the standpoint of the accused as well as from the standpoint of society. See United States [ex rel. Starner] v. Russell, [378 F.2d 808 (3d Cir.), cert. denied, 389 U.S. 889 (1967)].
>
> This Honorable Court has never held that a more severe punishment on a second trial is unconstitutional. The better and more just reasoning is found in those cases which hold that a new trial bears no relationship to a previous plea of guilty and begins with the slate wiped clean.

Brief of Petitioner in Simpson v. Rice, decided sub nom. North Carolina v. Pearce, supra, at 8-9.

The importance of this argument, in retrospect, is twofold. First, it conclusively demonstrates that the argument advanced by Petitioner is in no way novel. And, even more importantly, the plain fact is that this argument lost. The Court squarely held that the increased sentence imposed in Rice violated the Due Process Clause and, in doing so, imposed its well-known

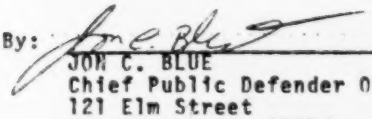
prophylactic rule. 395 U.S. at 725-26. The battle Petitioner seeks to wage has already been fought and lost, and no compelling reason exists to undo what is now one of the clear landmarks in our jurisprudence. The instant case is evidence enough that the various constitutional protections accorded criminal defendants who plead guilty, see Petition at 5-6, are no guarantee against the imposition of illegal sentences. And when, as in the instant case, such a sentence is imposed, there is no valid societal interest in chilling the constitutional and statutory right to challenge such a sentence.

One final consideration must be noted. The decision of the Supreme Court of Connecticut would be compelled even in the absence of the prophylactic rule of Simpson v. Rice because it is perfectly clear from the record that Respondent's increased sentence was vindictive in fact as well as in law. Petitioner's post hoc handwringing about "the traumatic impact" of the trial on the complaining witness, see Petition at 10, while ordinarily an understandable concern, is belied in this case by its previous representation to the habeas corpus court that it "would be delighted" to try the Respondent. State v. Sutton, supra, 197 Conn. at 490 n.9; Petition at 7A n.9. And, as discussed in the Statement Of The Case, supra, the only reason that Petitioner and the trial court provided for Respondent's increased sentence was his exercise of his constitutional right to trial. Under these circumstances, no presumption of vindictiveness is necessary. The decision of the Supreme Court of Connecticut should, consequently, not be reviewed.

CONCLUSION

The writ should be denied.

RESPONDENT
RONALD SUTTON

By: 

JON C. BLUE
Chief Public Defender Office
121 Elm Street
New Haven, CT 06510
(203) 789-7477
Counsel for Respondent

November 22, 1985